

FILED
07-03-2023
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

SUPREME COURT

Case No. 2022AP1522-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

Case No: 22AP1522

Circuit Court Case No. 20CM310

BRANDON B. SMILEY

Defendant-Appellant

Petition for Review from the Decision of the Court of
Appeals 4th District

PETITION FOR REVIEW

KIRK D. HENLEY

Attorney for Appellant-Defendant

State Bar No. 1107974

The Law Office of Kirk Henley, LLC

P.O. Box 511820

Milwaukee, WI 53203

attykirkhenley@gmail.com

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	2
ISSUES PRESENTED	3
CRITERIA FOR REVIEW	4
STATEMENT OF THE CASE	4
Statement of the Record	4
Statement of the Facts	5
ARGUMENT	7
I. MR. SMILEY WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL BECAUSE A MOTION TO SUPPRESS HIS IDENTIFICATION THROUGH THE PHOTO ARRAY WOULD HAVE BEEN SUCCESSFUL.	7
a. The Photo Array Was Impermissibly Suggestive Because Mr. Smiley Was the Only Individual Depicted in the Photo Array Who Met All of the Identification Factors.	7
b. The In-Court Identification of Mr. Smiley Could Not Be Independently Sourced Without the Use of the Impermissibly Suggestive Photo Array	9
c. Mr. Smiley Was Prejudiced by the Failure To Move to Suppress the Identification Through the Photo Array, Because Without the Photo Array, the State Would Not Have Been Able To Prove Their Case Beyond A Reasonable Doubt.	11
CONCLUSION	13
Appendix	100

STATE OF WISCONSIN

SUPREME COURT

Case No. 202AP1522-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

Case No: 22AP1522

Circuit Court Case No. 20CM310

BRANDON B. SMILEY

Defendant-Appellant

Petition for Review from the Decision of the Court of Appeals 4th District

PETITION FOR REVIEW

ISSUES PRESENTED

1. Whether Mr. Smiley’ Trial Counsel was ineffective for failing to move the Circuit Court to suppress the Mr. Smiley’s identification through a photo array because Mr. Smiley’s photo in the array was the only photo to match all of the descriptors given by the victim.
 - a. This issue was addressed in the Court of Appeals through the court of appeals review of whether a motion to suppress the identification would have been successful. The Court of Appeals determined that the photo array was not impermissibly suggestive, so a motion would have failed. Because the Court of Appeals determined that a motion to suppress would have

failed, the Court of Appeals found Mr. Smiley's trial counsel was not ineffective.

CRITERIA FOR REVIEW

This Court grants review only where special or important reasons are presented. Wis. Stat. § 809.62(1r). A case presents a special or important reason for review where a case presents a real and significant issue of federal or state constitutional law. Wis. Stat 809.62(1r)(a). This case presents a real and significant question of Wisconsin Constitutional Law because Mr. Smiley was denied his right to effective assistance of counsel. Furthermore, this case involves a question of whether Mr. Smiley was denied his right to due process through his identification in the photo array which is alleged to be impermissibly suggestive. Therefore, this matter involves two significant issues of Constitutional Law for this Court to resolve.

STATEMENT OF THE CASE

Statement of the Record:

On August 12, 2020, the state charged Mr. Smiley with lewd and lascivious behavior contrary to Wisconsin Statute Section 944.20(1)(b). R.2, 1. On November 23, 2020, Mr. Smiley entered a plea of not guilty and the matter was set for trial. R. 127, 2,9. A jury trial took place on September 13, 2021. R. 109. At trial, the jury returned a verdict of guilty for the single count alleged in the complaint. R. 109, 241. Judge Dehring entered a judgement of conviction on the verdict. *Id.* Mr. Smiley was sentenced to nine months in the county jail on October 26, 2021. R. 114, 15. On April 6, 2022, Defense filed a motion to set aside the verdict and judgement of conviction entered on September 13, 2021, alleging that Mr. Smiley's trial counsel, Attorney Karl Huebner, was ineffective. R. 130. A Machner hearing was held on June 23, 2022. R160.1. After the hearing, the order of the circuit court denied the Defense's motion. R154.1. An order of the Court of Appeals set the deadline for filing a notice of appeal to September 13,2022. R. 159, 2. A notice of appeal was timely filed on September 8, 2022. R. 165, 1. A decision of the court of appeals was file on June 2, 2023 denying Mr. Smiley's appeal.

Statement of the Facts:

On June 22, 2020, J.H. made a statement to police officers that she saw a man masturbating in the Dollar Tree located at 703 South Church Street in the City of Watertown, Jefferson County Wisconsin. R. 156, 1. The description J.H. gave was that the suspect was male, “approximately young to mid-20’s with curly hair, not an afro style, but ethnic, African American or mixed race with light skin, thin build, approximately 5’10” to 6’, wearing a baggy white t-shirt, baggy black pants or jeans.” *Id.* She also reported that she saw the man get into a blue vehicle with two support ribbons on it that were red, white, and blue “on each side of the Chevy emblem.” *Id.*

In her statement, J.H. said that she saw the man smiling at her and she said “hi” to him. R. 156, 1. She turned around to walk down the aisle, and she heard the man say “hey”, which caused her to turn back toward him. *Id.* When she turned, she observed the male subject had his penis exposed and in his hand. *Id.* She described that the man was masturbating successfully. *Id.* J.H. told officers that she saw the same individual one more time walking out of the store. *Id.*

On July 9, 2020, J.H. presented to the Watertown police department to view a photo array of potential suspects in the incident that occurred on June 22. R. 155, 1 The photo array contains six photos of young black men. *Id.* at 2. The photos are monochromatic black and white. *Id.* Five of the six photos depict young black men with dark skin and short hair. One of the six photos depicts a young black man with light skin and short hair. *Id.* The photo depicting a young black man with light skin and short hair is the photo depicting Mr. Smiley. *Id.* J.H. informed the officers on the photo array that she was about 30% sure or less that the photo of Mr. Smiley was the photo of the person she saw at the Dollar Tree on June 22 stating that the eyes on the photo were lighter. *Id.* at 3.

On September 11, 2020 Attorney Karl E Huebner was appointed to represent Mr. Smiley. Attorney Huebner represented Mr. Smiley at the jury trial on September 3, 2021. At the jury trial, J.H. identified Mr. Smiley as the person she saw masturbating at the Dollar Tree. J.H. stated at trial that she was only 60-70% sure that Mr. Smiley was the person she saw at the Dollar Tree. R. 109, 78. Attorney Teresa Beck

represented the state at trial. Attorney Beck established J.H.'s identification of Mr. Smiley with use of the July 9 photo array. *Id.*

The photo array and police reports cataloging the process used during the showing of the photo array to J.H. was provided to Attorney Huebner prior to trial. No motion was brought to the circuit court prior to trial to suppress the identification of Mr. Smiley through the July 9 photo array. R 160, 7.

At trial evidence was presented that Mr. Smiley may have been the driver of a vehicle that was at the Dollar Tree around the time of the incident with J.H. R. 109, 156. Additionally, testimony of Detective Matthew Lochowitz and exhibits 5, 6, and 7 showed that Mr. Smiley's GPS bracelet was located at the Dollar Tree on June 22. R. 109, 189. Defense filed a post-conviction motion to set aside the verdict and judgement of conviction entered on September 13, 2021, alleging that Mr. Smiley's trial counsel, Attorney Karl Huebner, was ineffective for failing to file a motion to suppress the identification made by J.H. prior to trial during the photo array. R 130.

At the Machner hearing Attorney Huebner testified that he believed that the photo array was not material to the state's case and so he did not pursue a motion to suppress the identification made through the photo array. R. 160 16-17. After arguments the court ruled that Attorney Huebner was not ineffective because it found that he was not deficient for failing to file a motion to suppress the identification of Mr. Smiley. *Id.* at 35. The circuit court's decision was based both on the court's opinion that the photo array was not impermissibly suggestive as well as the court's opinion that Attorney Huebner's performance was not deficient. *Id.*

Mr. Smiley appealed the decision of the circuit court and filed a brief on November 9, 2022. The decision of the court of appeals considered whether Mr. Smiley's trial attorney was ineffective for failing to move the circuit court to suppress the identification through the photo array. In deciding whether Mr. Smiley's trial attorney was ineffective, the court reviewed the merits of a motion to suppress the identification due to an impermissibly suggestive photo array. The court of appeals found that the photo array was not impermissibly suggestive.

The Court of Appeals 4th district denied Mr. Smiley's appeal in a decision filed on June 2, 2023. Mr. Smiley now petitions this Court to review the decision of the Court of Appeals.

ARGUMENT

I. MR. SMILEY WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL BECAUSE A MOTION TO SUPPRESS HIS IDENTIFICATION THROUGH THE PHOTO ARRAY WOULD HAVE BEEN SUCCESSFUL.

The first step in determining whether a defendant's counsel was ineffective is to determine whether their decisions at the time were deficient under the circumstances. "In considering alleged incompetency of counsel, one should not by hindsight reconstruct the ideal defense. The test of effectiveness is much broader and an accused is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation." *State v. Machner*, 285 N.W.2d 905, 907, 92 Wis.2d 797 (Wis. App. 1979), Quoting *State v. Harper*, 57 Wis.2d 543, 556-7, 205 N.W.2d 1, 9 (1973).

In the current case, the failure to bring a motion to suppress the identification of Mr. Smiley through the photo array was deficient because a motion to suppress the identification had a reasonable probability of success with the information that Attorney Huebner had at the time. The test for determining whether an out-of-court photographic identification is admissible or, on review, whether the out-of-court identification was properly admitted has two facets. First, the court must determine whether the identification procedure was impermissibly suggestive. Second, it must decide whether under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedures. *Powell v. State*, 271 N.W.2d 610, 86 Wis.2d 51 (Wis. 1978).

A. The Photo Array Was Impermissibly Suggestive Because Mr. Smiley Was the Only Individual

Depicted in the Photo Array Who Met All of the Identification Factors.

This Court should determine that where a person's complexion is one of the few descriptors given by a victim in a case, a photo array containing photos where the defendant is the only person who met all of the descriptors is impermissibly suggestive. "The validity of any photographic identification requires a case-by-case application of the rule to the particular facts of each case and must be determined in light of the totality of the surrounding circumstances." *Powell v. State*, at 616, citing *Holmes v. State*, supra, 59 Wis.2d at 495, 208 N.W.2d 815; *Simmons v. United States*, Supra, 390 U.S. at 383, 88 S.Ct. 967. "Some aspect of the photographs themselves might serve to emphasize unduly the photo of the suspect. The manner in which the photos are presented, grouped, displayed or otherwise exhibited to the eyewitness might be highly suggestive. Finally, the words or actions of the law enforcement official overseeing the viewing might lead or sway an uncertain viewer, thereby compromising the reliability of the resulting identification." *Id.*, citing *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). Regarding photo arrays, "[w]hat is required is the attempt to conduct a fair lineup, taking all steps reasonable under the 'totality of circumstances' to secure such result." *Powell*, 271 N.W.2d 610, quoting *Wright v. State*, 46 Wis.2d 75, 86, 175 N.W.2d 646, 652 (1970).

The non-clothing descriptors given by the victim in this matter were that of a light-skinned man of mixed race man in his mid-20's with curly hair that was not an afro and who was around 5'10" tall. Of these descriptors, what can be depicted through a photo of a person's face are a person's skin color, approximate age, and hair style.

A "unique identifying feature" in the defendant's photograph does not by itself satisfy a defendant's burden. See *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981). However, there is an increased danger of misidentification if the police show the witness an array in which the photograph of the suspect "is in some way emphasized." *Simmons*, 390

U.S. at 383. The decision of the Court of Appeals observed that all of the individuals in the photo array had a similar hair style and all of them were African-American and that an individual of mixed race is not necessarily light-skinned. However, the description given by the victim in this matter specified that the individual was a person of mixed race with light skin. The photo of Mr. Smiley is the photo that depicts the person with the lightest skin in the photo array. That Mr. Smiley's photo depicted the person with the lightest skin in the photo array emphasized his photo.

Five of the photos in the photo array show men with considerably darker skin than Mr. Smiley, making him noticeably distinguishable from the others because he is the only black male with "light skin." The circuit court and court of appeals referenced that the black and white nature of the photos instead of the complexion of the skin of the individuals could have caused this difference in appearance. However, that does not change the difference in appearance.

This photo emphasized one of the identifying factors that the victim described to the officers in her written statement more than the other photos in the array. Individuals in a photo array do not need to be identical, but when one photo depicts a someone that is clearly the odd man out in any way, the array should be found impermissibly suggestive.

B. The In-Court Identification of Mr. Smiley Could Not Be Independently Sourced Without the Use of the Impermissibly Suggestive Photo Array

Once a photo array is found impermissibly suggestive, "the state has the burden of showing that the subsequent in-court identification derived from an independent source and was thus free of taint." *Powell v. State*, at 66 citing, *Holmes v. State*, 59 Wis.2d at 496, 208 N.W.2d 815; *Fells v. State*, 65 Wis.2d 525, 536, 223 N.W.2d 507 (1974). Whether the in-court identification can be derived from an independent source is determined by the totality of the circumstances. *State v. Robertson*, 2019 WI 102, 389 Wis.2d 190, 205, 935 N.W.2d 813, 820 (Wis. 2019). The Court uses five factors to determine whether the totality of the circumstances shows that the

identification is derived from an independent source; “(1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of his prior description of the suspect, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation.” *Id.*, citing *Manson v. Brathwaite*, 432 U.S. at 114, 97 S.Ct. 2243.

The Court of Appeals has found that the in-court identification of a defendant can be free of the taint of an impermissibly suggestive photo array where the witness knew the defendant prior to the commission of the crime. *State v. Wiley*, 345 Wis.2d 847, 826 N.W.2d 123, 2013 WI App 13 (Wis. App. 2012). In *State v. Wiley*, the witness was shown a photo array of potential suspects in a homicide investigation. *Id.* The defendant in the case had physical defect in his right eye. *Id.* In the photo array shown to the witness, only the photo depicting the defendant showed someone with a physical defect in the right eye. *Id.* The circuit court found that the photo array was unduly suggestive. *Id.*

On appeal, the Court of Appeals found that although the photo array was unduly suggestive, suppression was erroneous because the state could prove that the in-court identification had an independent source. *Id.* The witness in *Wiley* had known the defendant and had seen him “‘practically every day’ or ‘every other day’ for five to ten years.” *Id.* at ¶15. Because of the independent identification of the defendant, the suggestive line-up did not taint the witness’s identification of the defendant. *Id.*

Wiley is differentiated from the current case because J.H. in the current case did not know the individual she saw in the Dollar Tree prior to the incident. She briefly saw the individual in the aisle while shopping. The opportunity for J.H. to view the suspect at the time of the crime was limited because of the briefness of their interaction. She saw the individual three times. (R. 109 at 73.) She saw the suspect first in the aisle of the Dollar Tree when the suspect said “hey”, second when she walked away, and finally when the suspect left the store. *Id.*

Because the suspect was exposing his penis and masturbating, J.H.'s degree of attention was limited at the time of their interaction. If J.H. was focused on the suspect's penis to the point that she observed him ejaculating, then J.H. likely did not have a good opportunity to view the suspect's face. J.H.'s prior description of the suspect was fairly generic. The description J.H. gave was that the suspect was male, "approximately young to mid-20's with curly hair, not and afro style, but ethnic, African American or mixed race with light skin, thin build, approximately 5'10" to 6', wearing a baggy white t-shirt, baggy black pants or jeans." No identifying factors such as facial scars, tattoos, or unique clothing or jewelry were provided. The level of certainty demonstrated at the confrontation was very low. J.H. said that she was only 30% sure that the person she saw at the Dollar Tree was Mr. Smiley.

Finally, the time between the crime and the confrontation was over two weeks. Seventeen days passed from the time that J.H. saw the suspect in the Dollar Tree until the time that she was presented with the photo array. Because J.H.'s in court identification would have been derived from an independent source, J.H.'s in-court identification of Mr. Smiley was not free of taint. Because the photo array was impermissibly suggestive and the in-court identification provided by J.H. would not have been independently sourced and free of taint, this Court should determine that Attorney Huebner's failure to file a motion to suppress was deficient performance in this case.

C. Mr. Smiley Was Prejudiced by the Failure To Move to Suppress the Identification Through the Photo Array, Because Without the Photo Array, the State Would Not Have Been Able To Prove Their Case Beyond A Reasonable Doubt.

The second prong of the test for ineffective assistance of counsel is the prejudice prong. *Stickland*, 466 U.S. at 682. Prejudice to determine ineffective assistance is defined as "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *State v. Guerard*,

2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12 (citing Strickland, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. “Whether counsel's deficient performance satisfies the prejudice prong of Strickland depends upon the totality of the circumstances at trial.” *State v. Jenkins*, 2014 ¶50 WI 59, 355 Wis.2d 180, 199, 848 N.W.2d 786, 795 (Wis. 2014).

The state provided information at trial that Mr. Smiley was at the Dollar Tree at the time of the incident through his GPS bracelet and that a vehicle that he was possibly driving left the parking lot at a similar time to the incident. However, without J.H.’s identification that Mr. Smiley was the individual who was exposing himself at the Dollar Tree, the state only had evidence on the record that Mr. Smiley was at the store at the time.

The circuit court determined that the circumstantial evidence that the state presented at trial was enough to prove beyond a reasonable doubt that Mr. Smiley was the individual who exposed himself to J.H. at the Dollar Tree, however, the circuit court failed to consider that without the in-court identification of Mr. Smiley as the person who exposed himself to J.H., the only evidence on the record of the person who exposed himself was that he was a young light-skinned black male with a short ethnic hair style. Mr. Smiley is surely not the only light-skinned black male in Jefferson County. The in-court identification is the keystone that the circumstantial evidence leans on in the state’s case. Without that in-court identification, the jury could have found different avenues to consider reasonable doubts regarding the state’s circumstantial evidence.

Because the jury could have considered different avenues of reasonable doubt at trial without the in-court identification, that the motion to suppress was never filed prejudiced Mr. Smiley.

CONCLUSION

For the aforementioned reasons, this court should grant review of this matter to resolve the real and important issue of Wisconsin Constitutional Law presented.

Dated this 3rd day of July, 2023

Respectfully submitted

Electronically Signed by Kirk D. Henley

KIRK D. HENLEY

Attorney for the Defendant

State Bar No. 1107974

The Law Office of Kirk Henley, LLC

P.O. Box 511820

Milwaukee, WI 53203

attykirkhenley@gmail.com

STATE OF WISCONSIN
SUPREME COURT

Case No. 2022AP1522-CR

STATE OF WISCONSIN

Plaintiff-Respondent

v.

Case No: 22AP1522

Circuit Court Case No. 20CM310

BRANDON B. SMILEY

Defendant-Appellant

I hereby certify that this brief conforms to the rules contained in s. 809.62 (4)(a) for a petition for review in that it is proportional serif font, minimum printing resolution of 300 dots per inch, 13-point body text. The text is 13-point type and the length of the petition is 3369 words.

Dated July 3, 2023 at Milwaukee, Wisconsin

Respectfully submitted

Electronically Signed by Kirk D. Henley

KIRK D. HENLEY
Attorney for the Defendant
State Bar No. 1107974

The Law Office of Kirk Henley, LLC
P.O. Box 511820
Milwaukee, WI 53203
attykirkhenley@gmail.com